

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

September 28, 2010

The Rhode Island Ethics Commission held its 17th meeting of 2010 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, September 28, 2010, pursuant to the notice published at the Commission Headquarters, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Barbara R. Binder, Chair Frederick K. Butler

Ross Cheit, Vice Chair Deborah M. Cerullo SSND

J. William W. Harsch, Secretary Edward A. Magro

James V. Murray John D. Lynch, Jr.

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt and Dianne L. Leyden; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:00 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on September 14, 2010. Upon motion made by Commissioner Murray and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To approve minutes of the Open Session held on September 14, 2010.

ABSTENTIONS: J. William W. Harsch and Edward A. Magro.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Daniel W. Majcher, Esq., Deputy Executive Counsel to the Office of the Governor. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Cheit, the Petitioner stated that he does not believe that someone is in his prior position but, if so, he would have the right to return to it. In further response to Commissioner Cheit, the Petitioner represented that he is not yet sure what he intends to do, as that will depend upon what guidance the Commission provides. He indicated that he could move back to his prior position in the Department of Administration or seek another position within state government. In response to Commissioner Murray, the Petitioner informed that his leave to protect status is not discretionary. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it

was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Daniel W. Majcher, Esq., Deputy Executive Counsel to the Office of the Governor.

The next advisory opinion was that of Clark Schoettle, a member of the City of Providence Historic District Commission (PHDC), who is also a member of the Board of Directors of the Providence Preservation Society (PPS). *Commissioner Butler recused and left the meeting.

Staff Attorney Gramitt presented the Commission Staff recommendation, which had been drafted by former Staff Attorney Esme DeVault. The Petitioner was present, along with Sean Coffey, Esq. Staff Attorney Gramitt noted that this matter was continued from the last meeting so that the Petitioner could attend and answer questions. The Petitioner clarified that the opinion he seeks relates to when the PPS attends a public comment session of the HDC, not when it appears relative to an application for relief. He stated that his business association with the PPS should not interfere with its ability to make a public statement about a matter that does not financially impact it. He noted that the goals of the PHDC and the PPS are very much in sync and suggested that the PPS is not unlike other advocacy organizations like the Chamber of Commerce, the Providence Foundation, Grow Smart or Save the Bay. He indicated

that the attorney for an applicant seeking a demolition raised the issue in an attempt to force three members to recuse. He informed that they did recuse and the PHDC carried on its business and issued the permit to demolish the building.

Attorney Coffey cautioned against the wide ranging implications of the draft opinion, which he indicated would not only impact the PHDC, but also RIPEC, the Providence Chamber of Commerce, Grow Smart, and Save the Bay. He stated his belief that individuals serving on entities like RIEDC and the CRMC also serve on advocacy boards. He suggested that the draft opinion represents a departure from prior Commission rulings. Attorney Coffey represented that any financial impact to the PPS is purely speculative, and he distinguished the advisory opinions cited in the draft opinion. He emphasized that the PPS is merely making public comment on a matter that does not financially impact it and argued that this conduct falls under the public forum exception of Regulation 7003. He asked the Commission to look at the impact of this opinion on other organizations like the RIEDC.

Staff Attorney Gramitt disagreed, noting that the draft opinion relies on section 5(f) rather than 5(a), which does not contain a financial component. He clarified that the issue is not one of saying that the Petitioner cannot serve on the PHDC, but that he cannot participate in this particular matter involving his business associate. He indicated that section 5(f) is based more upon an issue of bias or perceived

bias when the official sitting in a decision making position is on the board of an entity that is testifying in opposition to an applicant. In response to Commissioner Cheit's inquiry as to mootness, Staff Attorney Gramitt indicated that the issue is going to continue if the PPS continues to appear before the PHDC. Commissioner Cheit questioned whether there would still be a perception of bias if the Petitioner were just a member, not a board member. Staff Attorney Gramitt replied that if he were just a member he would not be a business associate of the PPS and he need not recuse.

Commissioner Cheit inquired if there is a one or two prong analysis to being a business associate, specifically whether one would just have to be a board member or if one would have to be a board member in a position to affect the finances of the organization. Staff Attorney Gramitt stated that there is a certain presumption in the advisory opinion context that a board member has the ability to impact the financial objectives of the organization. He informed that there is no independent investigation into what level of impact the individual has as a board member. Commissioner Cheit stated his belief that that piece is much less clear here than in past opinions in which the business associate was an applicant. Staff Attorney Gramitt noted that under a 5(f) analysis the Commission does not look at what the particular matter is before the public body. Commissioner Cheit commented that he did not think it is helpful for the Petitioner to use the Chamber of Commerce as an example because it has much more defined financial objectives.

The Petitioner stated his belief that there is a difference between how the PPS is appearing as a member of the public versus being an applicant. Attorney Coffey stated that the draft opinion cites to prior opinions that do not relate to section 5(f). Commissioner Cheit replied that the prior opinions relate to being a board member. In response to Chair Binder, Staff Attorney Gramitt advised that all of the prior opinions cited to in the draft, with the exception of the last, involve applicants. He clarified that sections 5(a) and 5(d) would not apply here because the PPS is not an applicant. Commissioner Cheit agreed with Attorney Coffey and stated that if the draft opinion relies exclusively on section 5(f) it is not helpful to cite to other sections of the Code.

In response to Commissioner Harsch's inquiry regarding the statute by which the PHDC is appointed building in a bias, Attorney Coffey indicated that the cases require a demonstration of actual bias. Chair Binder questioned whether if a statute builds in bias it is putting form over substance to make a distinction whether one is a board member of an organization or just a member. Commissioner Cheit expressed that the statute wants people with a certain point of view making these decisions. Staff Attorney Gramitt noted that it makes sense to include such people on the board, but they must recuse from time to time. He further advised that the General Assembly could create an exception to the Code every time it creates a board. He noted that it would be a departure for the Commission to say that a business

associate can appear before the board as long as there is no financial impact. Attorney Coffey commented that term business associate connotes some type of financial relationship, which does not fit with an advocacy organization coming before the PHDC to make public comment.

Commissioner Cerullo noted that the board member has a business associate relationship with his organization because he can financially impact the organization. She expressed that she has no question that a person serving on the board of a non-profit is a business associate of the non-profit. She questioned whether there could be a distinction based upon whether the appearance is for public comment or as an applicant. In response to the Petitioner's representation that there are about 800 PPS members and about 30 board members, Commissioner Cerullo commented that there are a lot of people available to comment who are not board members. Staff Attorney Gramitt pointed out that a board member can direct what public comments are made on behalf of the PPS. In response to Commissioner Cerullo, the Petitioner stated that the board approves a budget presented by the staff. Commissioner Cerullo stated that the board would then have oversight of the organization's financial objectives.

Staff Attorney Gramitt reiterated that section 5(f) is a bias related provision. He stated that it is a question of which interest takes precedence, having expertise in historical preservation on the board

or avoiding appearances of impropriety. In response to Commissioner Harsch, Staff Attorney Gramitt indicated that there is a bright line which, if moved a little because the facts as applied to one person's situation may be bad, would need to be moved for everyone.

In response to Commissioner Cheit, Staff Attorney Gramitt suggested that if there were an exception for where a statute sets up the bias, the General Assembly could override the Code. Commissioner Harsch noted the built in bias on the CRMC, where members have to be appointed from certain coastal areas, which has seen disastrous results.

Attorney Coffey suggested that the Commission could expand its public advocacy exception and stated that the Petitioner did not know he was regarded as a business associate. Chair Binder stated that the facts here are very sympathetic, but the Commission does not want to open the door to exceptions. She cautioned against not approving the draft opinion because the Commission is unsure what the ramifications could be. She suggested that it might be time to take a different look at the business associate analysis, but she is not sure this is the moment to do it. Commissioner Cerullo expressed that she is not sure there needs to be any change, as she is not troubled by the Commission's definition of business associate. She suggested that non-profits might need to think about how they set up their boards, noting that larger boards influence fundraising. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro to table the advisory opinion request, there was

discussion.

Commissioner Lynch questioned what the benefit would be to not issuing the draft opinion, given that the analysis would not change unless the rules were changed. Commissioner Harsch requested that the Staff provide an analysis of the issues raised and requested that Legal Counsel review same. Commissioner Cheit noted that, procedurally, the Petitioner's request is moot. Commissioner Lynch expressed his belief that tabling the matter does not benefit anyone unless section 5(f) is amended. Attorney Coffey informed that the Petitioner withdraws his request. Commissioner Cheit stated that this is a factual case where, for a series of reasons, it seems like the prohibition should not apply.

Legal Counsel Alves read from section 5(f). He suggested that the Commission could look at the words "concerning or presented by a business associate." Chair Binder stated that the Commission could define "concerning." Commissioners Harsch and Magro withdrew their motion to table the matter, which the Petitioner has now withdrawn. In response to Chair Binder, the Petitioner represented that he had recused from the matter before the PHDC.

*Commissioner Butler returned at 10:07 a.m.

The next advisory opinion was that of Mark W. Gee, a Fire Commissioner for the East Greenwich Fire District. *Legal Counsel

Alves recused. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Mark W. Gee, a Fire Commissioner for the East Greenwich Fire District.

The next advisory opinion was that of Carmino Paliotta, a Chief Distribution Officer for the Rhode Island Department of Environmental Management, Bureau of Natural Resources. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. In response to Commissioner Cerullo, Staff Attorney Gramitt informed that the Petitioner represents that he is not even advising the decision-makers and he has absolutely nothing to do with this matter. He clarified that the Petitioner represents that he is in the Bureau and the decision-makers are in a separate department. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Carmino Paliotta, a Chief Distribution Officer for the Rhode Island Department of Environmental Management, Bureau of Natural Resources.

ABSTENTIONS: Deborah M. Cerullo SSND.

The next advisory opinion was that of Robert Petit, a member of the Chariho Regional School Committee. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Chair Binder inquired whether this would be considered a contract as a whole. Staff Attorney Gramitt replied that he is unaware of any prior opinion in which the Commission found a group of 22 individuals to be significant. He suggested that it is really a class exception inserted into the nepotism regulation. Chair Binder asked if it is an entire class. Staff Attorney Gramitt stated that it is more of a subclass, where the class is all school district employees and the subclass is the administrators. Commissioner Murray expressed that he is troubled with finding 22 to be a subclass because it would apply to each and every administrator. He referenced a prior advisory opinion finding a relatively small number of individuals over 65 to constitute a class for purposes of an elderly tax exemption.

Commissioner Cheit stated that it would impact the entire group of 22, but he noted that, if the Petitioner's cousin strongly supported or opposed the issue, it would be less plausible that the Petitioner would take an action to benefit his cousin if it were a larger group involved. Chair Binder stated that the entire group is affected. In response to Commissioners Lynch and Cheit, Staff Attorney Gramitt recalled that the Commission has never put a specific number on what would constitute a class or subclass. Commissioner Murray

stated his belief that any class is significant when 100% of the class, here all 22 administrators, is affected. Staff Attorney Gramitt noted that the exception in Regulation 5004 is written slightly different than that of 7(b). Chair Binder concurred with Commissioner Murray. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was

VOTED: To issue an advisory opinion, attached hereto, a member of the Chariho Regional School Committee.

AYES: Deborah M. Cerullo SSND, J. William W. Harsch, Frederick K. Butler, Edward A. Magro and Ross Cheit.

NOES: James V. Murray, John D. Lynch, Jr. and Barbara R. Binder.

The next advisory opinion was that of Michael W. Miller, the Town Solicitor for the Town of Middletown. *Commissioner Lynch left the meeting at 10:23 a.m. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. *Commissioner Lynch returned to the meeting at 10:25 a.m. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Michael W. Miller, the Town Solicitor for the Town of Middletown.

At 10: 27 a.m., upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

**a.) Motion to approve minutes of Executive Session held on
September 14, 2010.**

**b.) In re: Kevin Carter,
Complaint Nos. 2009-2 & 2010-1**

c.) Motion to return to Open Session.

At 10:34 a.m., the Commission returned to Open Session. The next order of business was a motion to seal the minutes of the Executive Session held on September 28, 2010. Upon motion made by Commissioner Murray and duly seconded by Commissioner Lynch, it was unanimously,

VOTED: To seal minutes of the Executive Session held on September 28, 2010.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on September 14, 2010 by unanimous vote; and 2) approved an

Informal Resolution & Settlement of In re: Kevin Carter, Complaint Nos. 2009-2 & 2010-1 by unanimous vote.

The next order of business was a discussion regarding Probable Cause. Senior Staff Attorney D'Arezzo presented a staff memorandum regarding: the probable cause standard, consideration of the knowing & willful standard at probable cause, the Respondent's role at the probable cause hearing; and what type of evidence may be considered at probable cause. She advised that a recent RI Supreme Court decision, State v. Flores, is instructive regarding the probable cause standard. Although its consideration was in a criminal law context, she indicated that the standard could be applied in civil administrative proceedings before the Commission.

She stated that the Commission had inquired if there were a need to create a procedural mechanism by which, subsequent to probable cause, the Prosecution may move to dismiss a Complaint for which it cannot meet its burden of proof at adjudication. She informed that there is no need to create a specific mechanism, as the procedure is inherent.

Commissioner Cheit expressed that that was not the Commission's concern. He stated that its concern was that the Commission is making a determination at a low threshold. He commented that the Commission can see where a case is heading, but it is not supposed to make real judgments as to credibility at that stage, so it may be forced to vote to find probable cause. Commissioner Cerullo

concluded. Chair Binder indicated that she wanted more information as to consideration of the knowing & willful requirement at probable cause.

Legal Counsel Alves advised that probable cause gives the Respondent two bites of the apple, and particularly an opportunity to see what evidence the Prosecution has. Chair Binder asked, if the Prosecution's evidence is weak, where does the Commission make that determination. Legal Counsel Alves stated that once the Commission makes its initial determination based on the four corners of the Complaint, the Prosecution has no discretion not to go forward. Commissioner Cheit wondered what kind of a bite it would be for the Respondent if, were the probable cause threshold taken seriously, the threshold is so low that the Commission cannot consider the evidence. He asked if the Commission were not kidding the Respondent to say that he can come in and argue at probable cause if the Commission's consideration is so limited. He indicated that when the Respondent presents argument and evidence at probable cause, it is a meaningless exercise given the low threshold.

He stated that of course a reasonable person would believe that the Respondent violated the Code because the Prosecution does.

Commissioner Cerullo expressed that her issue is more of why does the Commission make the probable cause determination, as it is the same trier of fact. She noted that the Respondent can get the tenor of the room at the hearing and, in response thereto, not feel any

pressure to settle. She suggested that it gives the Respondent the opportunity to see the weakness of the Prosecution's case. Chair Binder noted that the Commission is not hearing witnesses or assessing their credibility. In response to Commissioner Cheit, Legal Counsel Alves advised that the regulation which allows the Respondent to be present at probable cause tracks the statute. He stated that it is an opportunity for the Respondent to assess the case and see what the Commission thinks of it. He indicated that the procedure is to the Respondent's advantage. Commissioner Cheit question if they have been going beyond what they are supposed to be doing at probable cause. He inquired as to whether there are cases in which the Prosecution is aware that it is presenting more or less information at probable cause. Senior Staff Attorney D'Arezzo informed that in cases in which the Prosecution is arguing that the Complaint should be dismissed for lack of probable cause, it will present more information to establish why the case should not go forward.

Commissioner Cheit commented that the staff memorandum does not acknowledge the lack of prosecutorial discretion. He stated that the Commission needs to be told if that is a problem. Senior Staff Attorney D'Arezzo stated that what seems to be a fundamental problem is applying the probable cause standard after the investigation is completed. She noted that the Commission must complete its entire investigation prior to probable cause, which results in the Prosecution having all of the evidence it will be going

forward on at the probable cause stage. Commissioner Butler questioned if there is a distinction between the standards of a person of reasonable caution versus a reasonable person. Commissioner Lynch stated that the sufficiency at probable cause must be much higher. He questioned whether the information presented is trustworthy, which would involve a reliability assessment.

Chair Binder commented that the Flores case involved probable cause to arrest and stated that she is not sure the standard is applicable to Commission proceedings. Senior Staff Attorney D'Arezzo informed that her research did not reveal case law with respect to the standard in a civil administrative context, but only as to civil actions for malicious prosecution. Legal Counsel Alves advised that the civil standard is actually lower, so it is prudent to go with the recent articulation of the criminal standard. Commissioner Cheit clarified that this is not a criticism regarding how cases have been presented. Commissioner Harsch inquired as to the Commission's ability to delegate the probable cause determination to the Executive Director or a subcommittee of the Commission. Senior Staff Attorney D'Arezzo replied that the statute requires that the Commission make the determination and issue written findings. She noted that previously, when there was a fifteen member Commission, the statute expressly required the Chair to appoint members to an investigating committee for such purpose.

Commissioner Butler suggested that if the Commission itself were

not making the probable cause determination it would remove the benefit of the Respondent being able to get a sense of his or her case before the Commission. Commissioner Harsch questioned if the Commission could eliminate the probable cause hearing and make initial determination be its version of probable cause. Commissioner Lynch observed that it is a base allegation at the initial determination stage. Chair Binder stated that at probable cause what the Commission sees happening is trying to elicit more facts and honing in on issues of law, like the knowing & willful standard. She commented that she does not know where the Commission goes with such a low standard for probable cause. Legal Counsel Alves inquired about submitting legislation to move up the probable cause determination. Commissioner Lynch suggested that it is almost better to leave it to the Respondent as an option if they even want to have it, and then make it clear with guidelines, such as all evidence being viewed in the light most favorable.

Commissioner Lynch indicated that the language regarding reasonably trustworthy information almost parallels Rule 9 in Superior Court. He stated that credibility is not assessed so the judge has not been a finder of fact. He stated that he wants to be told what he is supposed to look at, not look at, and whether it is sufficient. Chair Binder suggested that that might be a statutory change. For the next meeting, she requested that a copy of Rule 9 be provided for the Commission to review and see if that is a direction in which it wants to go. Commissioner Cerullo noted that they are all

attorneys and wondered what affect that might have on its consideration of the probable cause standard. She suggested that maybe they are just being asked to hear the case and not trouble themselves with that which with they seem to be troubled. Chair Binder expressed support for looking at the civil rules and come back in two weeks to rehash the issue.

The next order of business was the Director's Report. Executive Director Willever informed that there are six complaints, three advisory opinions and one litigation matter pending. He advised that there will likely be an increase in complaints by the next meeting due to the filing of financial disclosure complaints. He stated that two formal APRA requests were granted since the last meeting. Executive Director Willever informed that the Commission has received authorization to fill the vacant Staff Attorney I position, which he anticipates will be filled by early November. He indicated that the position has been advertised and applications are due by October 1st.

The next order of business was New Business. Chair Binder stated that the Commission will be taking up the probable cause issue, as well as the treatment of members of umbrella unions and professional organizations. She stated that she will be meeting with staff to winnow down the background material for distribution to the members. Commissioner Harsch requested that an index of what has been produced be provided. Chair Binder asked that the issue of the

definition of business associate raised today be placed near the top of the Commission's list for proposed regulatory action.

At approximately 11:23 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary